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IN THE

Supreme Court Of The United States

No. 483

PEARL DETENBER, Administratrix of the estate of Terry Detenber, deceased
and
VIOLA B. TOWNSEND, Administratrix of the estate of Richard Mattingly, deceased - Petitioners

vs.

AMERICAN UNIVERSAL INSURANCE CO. - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No. ———

PEARL DETENBER, Administratrix of the estate of Terry Detenber, deceased
and
VIOLA B. TOWNSEND, Administratrix of the estate of Richard Mattingly, deceased - - - - - *Petitioners*

vs.

AMERICAN UNIVERSAL INSURANCE CO. - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Pearl Detenber, Administratrix of the estate of Terry Detenber, deceased, and Viola B. Townsend, Administratrix of the estate of Richard Mattingly, deceased, respectfully pray that a writ of certiorari issue from this court, in the above entitled action, to review a final decision of the United States Court of Appeals for the Sixth Circuit rendered on

February 9, 1967, a petition for rehearing having been denied on April 12, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 372 F.2d 50. It was rendered and filed on February 9, 1967, and is printed in its entirety in Appendix "A" hereto, at pages 12–18. The petition for rehearing was filed March 28, 1967, and denied on April 12, 1967.

The judgment of the District Court was entered on March 9, 1965, directing the dismissal of petitioners' complaints and is printed in its entirety in Appendix "B" hereto at pages 19–21.

JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on February 9, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

THE QUESTIONS PRESENTED

1. Does the judgment of the Court of Appeals affirming the judgment of the District Court granting respondents a summary judgment violate the provisions of Rule 56(c) of the Federal Rules of Civil Procedure?

2. If respondent insurer supplies its insured with counsel, who, while acting as insured's lawyer in an

automobile guest action, attacks the insured and openly charges his client with drunkenness and reckless driving, despite the testimony of his client to the contrary, is there an issue of fact as to respondent's negligence or lack of good faith, in the conduct of the client's trial before a jury?

RULES INVOLVED

The rule involved in this appeal is Rule 56(c) of the Federal Rules of Civil Procedure, which is printed in Appendix C, infra, at page 21.

STATEMENT

This matter grew out of a trial in a State Court in Kentucky, which in turn grew out of a vehicular accident. Terry Detenber, 15, and Richard Mattingly, 14, were passengers in an automobile driven by Michael Clark, 18, which was involved in a collision with a bus owned and operated by the Louisville Transit Company. The collisions resulted in the deaths of Detenber and Mattingly and their administrations brought the state court action against Clark and the transit company. Throughout most of the settlement negotiations prior to trial representatives of the respondent, Clark's insurer, urged a want of actionable negligence on Clark's part, as did Clark by statements given to respondent, and by depositions made by said Clark in pre-trial depositions in the State Court proceedings. The record in the present action contains a statement of Clark that

he went into the state court trial with the understanding from the respondent that the defense would be want of negligence on his part, and that the transit company was solely responsible for the collision.

During pre-trial negotiations and proceedings in said state court action, Clark had been represented by personal counsel and by an insurance company attorney. On the day of the trial a different insurance company lawyer filed an amended answer alleging that Clark's passengers assumed the risk of riding with him. Respondent's position that the accident was solely caused by the transit company was abandoned and every effort was made by respondent's lawyer to put Clark (his client) in as bad a light as possible, and he contended throughout the trial that Clark (his client) had been drinking and driving recklessly. Clark was not advised of his change in defense, and did not agree to it prior to, or during the trial. The change of defense was not discussed with Clark's personal attorney.

Respondent's lawyer relentlessly attacked Clark throughout the state court trial, both before the jury in open court, and in chambers before the Judge, although he was his lawyer. By examination, cross-examination and in final argument respondent's lawyer stressed not only that negligence on Clark's part proximately resulted in the principal accident, but also his negligent operation prior thereto. He totally ignored Clark's testimony to the contrary and asked the jury not to believe him. He also permitted evi-

dence that Clark had been indicted for voluntary manslaughter (a felony in Kentucky) to be received in evidence without objection or explanation; whereas in fact, Clark's plea of guilty was to the offense of negligent homicide (a misdemeanor in Kentucky). Respondent's lawyer's acts in this respect were in contravention of an agreement with Clark's personal attorney, under which it was agreed that Clark would have an opportunity to explain his plea of guilty to negligent homicide if it was proven. No explanation has ever been offered concerning failure of respondent's attorney to discuss fully with his then client the alternative defenses available to him and the significance of the filing on the day of the trial of the amended answer, or even to advise Clark of the fact of such filing. The result of the state court trial was a verdict assessing 90 per cent of the damages against Clark and 10 per cent against the transit company.

The limit of the insurance policy issued by respondent providing coverage to Clark was $10,000.00, and that entire sum (after payment of a small amount in settlement of two bus passengers' claims) was applied on the Detenber, Townsend and Ross judgments. The transit company paid its 10 per cent and there remained an unpaid balance in excess of $24,000.00 in each of the judgments favoring Detenber and Townsend. In exchange for a complete release, as to these unpaid balances, Clark assigned to the petitoners herein his claim against the respondent for negligence in the conduct of the trial of his

case, and for having acted without good faith and in bad faith to him in the state court trial. The petitioners brought action in the District Court leading to the filing of cross motions for summary judgment before the Honorable District Court Judge Henry Brooks. Petitioners' motion for summary judgments was overruled, and respondent's motion for summary judgment was sustained with entry of judgment thereunder.

Respondents appealed from the ruling of Judge Brooks, and the United States Court of Appeals for the Sixth Circuit on February 9, 1967, rendered a decision affirming the judgment entered by Judge Brooks. A petition for rehearing was denied on April 12, 1967. The mandate of the Court of Appeals has been stayed pending petitioners' application for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN SARTOR v. ARKANSAS NATURAL GAS CORP., UNITED STATES v. DIEBOLD, INC., AND WHITE MOTOR CO. v. UNITED STATES, UNDER RULE 56(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

This Court gave its interpretation of Rule 56(c) in the case of Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.ed. 967, and said:

> "The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."

In the case of United States v. Diebold Incorporated, 369 U.S. 654, 82 S.Ct. 993, 8 L.ed. 2d 176, this Court further stated that on motion for summary judgment under Rule 56(c), the inferences to be drawn from the underlying facts contained in such material as affidavits, attached exhibits and depositions must be viewed in the light most favorable to the party opposing the motion.

In the case of White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.ed. 2d 738, this Court has stated that summary judgment is not appropriate where motive and intent play leading roles.

As more fully stated hereafter, the decision below conflicts with the principles asserted in these cases.

2. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE PROVISIONS OF RULE 56(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE AS INTERPRETED AND APPLIED BY OTHER DECISIONS OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

In the case of S. J. Groves & Sons Co. v. Ohio Turnpike Commission (CA 6th) 315 F.2d 235, cert.

denied 375 U.S. 824, 84 S.Ct. 65, 11 L.ed. 2d 57, the Court denied the propriety of a summary judgment even where the facts are not in dispute, where the parties may in good faith disagree about inferences to be drawn from the facts and added:

> ". . . a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one."

The Court of Appeals for the Sixth Circuit in the foregoing opinion cited the Supreme Court cases of Sartor v. Arkansas Gas Corp., and White Motor Co. v. United States, supra.

Other decisions of the Court of Appeals for the Sixth Circuit following the rule in the above Supreme Court cases are:

Knapp v. Kinsey, 249 F.2d 797
Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425
Begnaud v. White, 170 F.2d 323
Estepp v. Norfolk & W. Ry. Co., 192 F.2d 889
Bellak v. United Home Life Ins. Co., 211 F.2d 280
Hoy v. Progress Pattern Co., 217 F.2d 701

The decision below conflicts with the Sartor, Diebold, and White Motor Co. cases decided by this Court and the cited decisions of the Court of Appeals for the Sixth Circuit, whatever view may be taken as to the applicable state law. The complaints here allege negligence and the failure to exercise good faith and charge respondent with acting adversely to the in-

sured's interest in the defense of his state court trials. The actions of the attorney supplied by the respondent insurer, set out in the transcript of the proceedings of the state court actions and the other papers before the courts below, upon the motions for summary judgment, raise substantial issues of fact related to the requirement of the insurer to exercise ordinary care in conducting the defense it was under duty to provide. Ballard v. Ocean Accident & G. Co., (CA 7th), 86 F.2d 449; Attleboro Mfg. Co. v. Frankfort Marine Acc. Ins. Co. (CA 1st), 240 F. 573. There is an issue as to the failure of respondent's attorney to withdraw from the defense of the state court trials rather than to proceed with hostility to his client. There is a substantial issue as to whether respondent insurer gave as much consideration to the financial well-being of the insured as it did to its own interest. There is substantial issue as to whether respondent's counsel exercised the same high standards which govern all lawyers, whether or not privately retained, in his conduct of the defense of the insured.

Moreover, these issues of fact relate equally to the question of the respondent's want of good faith, if the law of Kentucky is, as the lower court held, that recovery will lie only if failure to exercise good faith is established. Good faith is defined by the Kentucky Court of Appeals in its most recent decision of Roehrig v. Merchants and Businessmens Mutual Insurance Company (Ky., 1965), 391 SW 2d 369, 371 as follows:

> "What is the meaning of 'good faith' as that expression applies to the facts presented? It can be, and usually is, something less than perfection or complete accuracy. Above all it means not to take advantage of, not to deceive, not to be underhanded. Black's Dictionary states on this point: 'Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information, notice, or belief of facts which would render the transaction unconscientious'."

In order to affirm the District Court's award of summary judgment the Court of Appeals was required to hold that the conduct of counsel for Clark could not constitute lack of good faith as a matter of law. Because the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing a motion for summary judgment and because summary judgment is not appropriate where motive and intent play leading roles, the Court below could not properly make such a holding.

In this connection, the following language of the opinion of the Court of Appeals seems significant:

> "While such failure is felt by this court to be reprehensible, our consideration in the present situation must be directed to legal, not ethical issues. We emphasize the fact that nothing stated in the course of this opinion is to be read as condoning counsel's lack of communication to his client."

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

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APPENDIX "A"

PEARL DETENBER
Administratrix of the Estate
of Terry Detenber, Deceased - Plaintiff-Appellant

v.

AMERICAN UNIVERSAL
INSURANCE CO. - - Defendant-Appellee

VIOLA B. TOWNSEND,
Administratrix of the Estate
of Richard Mattingly,
Deceased - - - - Plaintiff-Appellant

v.

AMERICAN UNIVERSAL
INSURANCE CO. - - Defendant-Appellee

Appeal from the United States District Court
for the Western District of Kentucky

United States Court of Appeals
Sixth Circuit
Nos. 16728, 16729
Feb. 9, 1967

Before EDWARDS and PECK, Circuit Judges and FOX, District Judge.

JOHN W. PECK, Circuit Judge.

Having upon motion been consolidated by the District Court, these actions were there and will here on this appeal be considered as a single case.

The present controversy grew out of a trial in a state court in Kentucky, which in turn grew out of a vehicular accident. Terry Detenber, 15, Richard Mattingly, 14, and a Patricia Ross were passengers in an automobile driven by Michael Clark, 18, which was involved in a collision with a bus owned and operated by the Louisville Transit Company. The collision resulted in the deaths of Detenber and Mattingly, and their administratrices and Miss Ross brought the state court action against Clark and the Transit Company. A verdict assessing damages in favor of each plaintiff was returned, the verdict further making an apportionment of the damages 90% against Clark and 10% against the transit company. The transit company satisfied its portion of judgments entered on the verdict and is not a party to the present action. Similarly, we are not here concerned with the judgment in favor of Patricia Ross.

Throughout most, if not all of the settlement negotiations, prior to trial representatives of the present defendant, Clark's insurer, urged a want of actionable negligence on his part. Clark subsequently testified (in the present action) that he went into that trial with the understanding that the defense would be want of negligence on his part, and that the transit company was solely responsible for the collision.

During pre-trial negotiations and proceedings Clark had been represented by personal counsel and by an insurance company attorney, but on the day of trial another of the defendant insurance company's lawyers appeared as sole trial counsel. On that day he filed an amended answer in which it was alleged that Clark's three passengers assumed the risk of riding with him, and the case proceeded through trial

on that defense. As will be hereinafter more fully indicated, not only was the position that the accident was solely caused by the transit company abandoned but every effort was made to put Clark in as bad a light as possible, his trial attorney claiming that he had been drinking and was driving recklessly. Clark was not advised of this change in defense and did not agree to it either prior to or during the trial. Similarly, the change of defense was not discussed with Clark's personal attorney, and he had not read a copy of the amended complaint with which he had been provided.

The limit of the policy issued by the defendant providing coverage to Clark was $10,000 and that entire sum (after payment of a small amount in settlement of two bus passengers' claims) was applied on the Detenber, Townsend and Ross judgments. After the payment of such sums, and of those paid by the transit company, there remained an unpaid balance in excess of $24,000 on each of the judgments favoring Detenber and Townsend. In exchange for a complete release as to these unpaid balances, Clark assigned to the plaintiffs in the state court action and here his claim against the defendant for having acted without good faith and in bad faith to him in the state court trial. They brought action in the District Court, leading ultimately to a filing of crossed motions for summary judgment. Plaintiffs appeal from the overruling of their such motion, and from the sustaining of defendant's motion and entry of judgment thereunder.

There can be no doubt of the relentlessness of the attack made upon Clark during the state court trial by the insurance company attorney ostensibly defending him. In a chambers conference prior to the

opening of that trial, he made this statement: "The sole defense available to the Clark boy in this case is the defense of assumed risk, and if (plaintiffs' counsel) doesn't prove, I am going to prove that these young people got in the car, they knew that the driver was drinking, they knew he had done it on other occasions, that they went down the street and actually had physical possession of whiskey in the back. I am going to produce a witness that saw them driving erratically, weaving, at 50 miles an hour, they struck a parked car approximately nine blocks from the scene of this accident, * * * they didn't stop after having that accident, but they fled from the scene of that accident to the scene of this one, and I say to you that when young people of the age of 15 and 17, of that age, under the law with the Court of Appeals, when they get into a car in which there is drinking —there is no claim this young man was drunk, but I have got a drinking case—when the car is being driven in a reckless manner, and riding in that car, and I don't know what is more reckless than hitting a car and keeping on going, and I will say to you they assume the risk."

In a course of action consistent with his Chambers' statement, defense counsel throughout trial, by examination, cross-examination and final argument stressed not only that negligence on Clark's part proximately resulted in the principal accident, but also his negligent operation prior thereto. He also permitted evidence of Clark's conviction on a plea of guilty of voluntary manslaughter as a result of the death of the Detenber and Mattingly boys to be received in evidence without objection or explanation. This apparently was in contravention of an agreement with Clark's personal

attorney, under which it was agreed that Clark would have an opportunity to explain this plea if it were proven.

No satisfactory explanation has ever been offered concerning the failure of the present defendant's attorney to fully discuss with his then client, Clark, the alternative defenses available to him and the significance of the filing on the day of trial of the amended answer—or to even advise him of the fact of such filing. While such failure is felt by this Court to be reprehensible, our considerations in the present situation must be directed to legal, not ethical, issues. We emphasize the fact that nothing stated in the course of this opinion is to be read as condoning counsel's lack of communication to his client.

The first of the two legal issues is whether the defendant insurance company's attorney is guilty of bad faith in his representation of Clark, the company's insured. The record of the trial in the state court clearly established that prior to trial the insurance company offered settlement in the full amount of its coverage ($10,000.00), and that this offer was repeated during the trial. Thus it might first appear that it had nothing to gain and could only incur expense by proceeding through trial, and that its attorney's only objective was to protect Clark by keeping the verdict as close as possible to the policy limit. As reflection will quickly indicate, this is not the whole story and it may be at least as plausibly argued that the assumption of risk defense was adopted as the only course which could benefit the insurance company; specifically, it could save the company its $10,000. On the other hand, it was a defense more fraught with danger for Clark than for the company, since if it found

liability a jury inflamed by accusation of his carelessness and of driving while under the influence of alcohol would scarcely incline to a niggardly verdict. Further, having his own lawyer join with those for the plaintiffs and the Transit Company in placing such blame on him could have played a part in the jury's determination that Clark should pay 90% of the damages.

Persuasive as such considerations might be in other jurisdictions, the law of Kentucky on the point at issue seems to have been clearly established in American Surety Co. v. J. F. Schneider & Son, 307 SW 2d 192 (Ky. 1957). Therein the highest court of Kentucky once more recognized the duty of an insurer to exercise the upmost good faith and the corollary that action in bad faith or failure to exercise good faith is sufficient to create liability on the part of the insurer for the excess of a verdict beyond policy limits, but that court specifically held that: "Mere errors of judgment are not sufficient to constitute bad faith." Id. at 195. Again, the court in Harrod v. Meridian Mutual Ins. Co., 389 SW 2d 74, 76 (Ky. 1964), stated that bad faith "is not simply bad judgment. It is not merely negligence. * * * It implies conscious doing of wrong. * * * It partakes of the nature of fraud." See also, Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 SW 2d 777 (1932).

Although capable of being discounted as self-serving declarations, in fairness to defense counsel, since the negative aspects to Clark of the defense adopted have been emphasized, certain of his statement should not go unnoticed. Defense counsel initially and repeatedly stated that in his professional opinion assumption of risk (contributory negligence) was the best and only defense available to Clark, and

in other ways, such as in connection with Clark's driving rights, he made pointed effort to afford protection.

It was the view of the District Court, as expressed in its Judgment, that "In view of the substantial evidence of drinking on the part of * * * Clark, and of the introduction in evidence in the state court action of his plea of guilty to a criminal charge of negligent homicide, the defense of assumed risk asserted by counsel for the American Universal Insurance Co. to the claims of the passengers in the Clark automobile was a proper and justifiable defense to be asserted and, if accepted by the jury in the state court action, was calculated to relieve * * * Clark of any responsibility or liability." Citing Georgia Casualty Co. v. Mann, supra, and American Surety Co. v. J. F. Schneider & Son, supra, District Judge Henry L. Brooks concluded that a finding of bad faith or negligence in the conduct of the state court action by the insurance company counsel was not justified, and that conclusion will be affirmed.

In view of this determination it is not necessary to here make disposition of the remaining issue. It deals with the determination of damages, and we observe only that it is difficult in the extreme to fathom how Clark could sustain the burden of demonstrating that he would have had better chances had the "no negligence" defense been adhered to, and if so of establishing the difference in terms of monetary damages.

Affirmed.

APPENDIX "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
At Louisville

PEARL DETENBER, etc.

vs. Civil Action #4568

AMERICAN UNIVERSAL
INSURANCE COMPANY

VIOLA B. TOWNSEND, etc.

vs. Civil Action #4591

AMERICAN UNIVERSAL
INSURANCE COMPANY

JUDGMENT—ENTERED MARCH 9, 1965

This cause coming on to be heard on the motions of both the plaintiffs and the defendant for summary judgment, and the Court having considered the entire record, including the Transcript of the Proceedings in the Jefferson Circuit Court and the Transcript of Record in the Jefferson Circuit Court action, and having heard arguments of counsel at pre-trial conferences and having considered the various briefs filed by the respective parties, and being advised, makes the following Finds of Fact and Conclusions of Law:

1. The pleadings and the record, including the depositions and transcript of testimony, filed herein reveal that there is no issue of fact presented and that the action is one which may appropriately be disposed of by summary judgment.

2. In view of the substantial evidence of drinking on the part of American Insurance Company insured, Michael Clark, and of the introduction in evidence in the state court action of his plea of guilty to the criminal charge of negligent homicide, the defense of assumed risk asserted by counsel for the American Universal Insurance Company to the claims of the passengers in the Clark automobile was a proper and justifiable defense to be asserted and, if accepted by the jury in the state court action, was calculated to relieve American Universal Insurance Company's insured, Michael Clark, of any responsibility or liability.

3. The readiness of American Universal Insurance Company, prior to the trial of the action and at the trial of the action, to pay its policy limits and the conduct of the trial of the state court action by John A. Fulton, Counsel for American Universal Insurance Company, in a reasonably skillful, professional manner reveals that the defendant company exercised good faith in protecting the rights of its insured, Michael Clark.

4. Mr. Frank E. Haddad, Jr., a member of the Kentucky Bar and of the Bar of this Court, represented the insured, Michael Clark, personally in the state court criminal action and in the civil action, but did not participate in the trial of the civil action.

5. For the foregoing reasons and pursuant to the law of Kentucky as set forth in Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 SW 2d 777, and American Surety Company of New York v. J. F. Schneider & Son, Ky., 307 SW 2d 192, it is concluded that a finding of bad faith or negligence in the conduct of the state

court action by insurance company counsel is not justified, and

IT IS, THEREFORE, ORDERED, CONSIDERED AND ADJUDGED that the motion of American Universal Insurance Company for summary judgment be, and the same is, hereby sustained, and the complaints as amended are dismissed with prejudice, and that defendant recover its costs herein expended.

Dated this 9th day of March, 1965.

/s/ Henry L. Brooks
Henry L. Brooks
United States District Judge

APPENDIX "C"

Federal Rules of Civil Procedure 56(c)

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. ———

PEARL DETENBER, Administratrix of the Estate of TERRY DETENBER, Deceased, and VIOLA B. TOWNSEND, Administratrix of the Estate of RICHARD MATTINGLY, Deceased, - - - - - - - - *Petitioners,*

v.

AMERICAN UNIVERSAL INSURANCE COMPANY, - - - - - - - - *Respondent.*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

American Universal Insurance Co., Respondent herein, prays that the request for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on February 9, 1967, be denied.

I. CITATION TO OPINIONS BELOW.

The judgment of the District Court is unreported and is printed in the Petitioners Appendix "B", pages 19-21. The opinion of the United States Court of Appeals is printed in the Petitioners Appendix "A", pages 12-18 and is reported as Detenber v. American Universal Insurance and Townsend v. American Universal Insurance. (C. A. 6th), 372 F. (2) 50.

II. JURISDICTION.

The jurisdiction of this Court is sought pursuant to the provisions of 28 USCA 1254(1).

III. QUESTIONS PRESENTED.

1. May Petitioners raise questions of law in this Court which were raised for the first time upon petition for rehearing in the Appellate Court and never raised in the District Court?
2. Does the judgment of the Court of Appeals affirming the judgment of the District Court violate Rule 56(c) of the Federal Rules of Civil Procedure?

IV. RULES INVOLVED.

The rule involved in this appeal is Rule 56(c) of the Federal Rules of Civil Procedure, which is printed in Petitions Appendix C at page 21.

V. COUNTER-STATEMENT OF CASE.

Two actions for wrongful death and one for personal injury involving three teen-age passengers in the automobile of Michael Clark were instituted in the state court in Kentucky. The collision resulting in the fatalities and injury took place at an intersection in Louisville, Kentucky, and involved Clark's car and a bus of the Louisville Transit Company. Plaintiffs in the state court action, Petitioners here, sought to recover against both Clark and the bus company. The testimony in the state court action introduced by the plaintiffs and the transit company may be summarized as follows:

About 7:30 p.m. on a rainy Saturday night in 1961, 18 year-old Clark and three younger companions went to the home of Clark's cousin, Patty Ross, to meet Patty and another young lady for an evening's entertainment. The girls were not ready when the young men arrived and Clark and his three friends drove to a liquor store and "were gone something like an hour" (R. 24b). The boys had an "older fellow" purchase some alcoholic beverages of a disputed quantity. Clark testified that this person "purchased us a half-pint of whiskey" (R. 48a). In a written statement signed by Clark five days after the accident, Clark related "we had an older fellow get us a six-pack of beer and a half-pint of gin at a bar" (R. 54a). One of the other boys recalled the purchase of the liquor and of drinking some of it (R. 64b). The injured plaintiff, Patty Ross, saw the half-pint whiskey bottle when she got in the car

(R. 57b). Police officers at the scene of the fatal collision found in the car the half-pint bottle of whiskey and one can of beer unopened (R. 87a-88a). The boys opened the whiskey where they purchased it and mixed it with coca-cola (R. 25b), and drove around drinking the gin and beer (R. 54a). Upon returning to the home where the girls were the six young people departed, with Clark driving, "to just ride around awhile" (R. 54a). The Clark automobile proceeded through the west end of Louisville and on Hale Street, about nine blocks from the scene of the fatal collision, some sort of collision occurred (R. 50a). Clark's version of this first collision was that an oncoming car crowded him into a protective horse at a hole being dug in the street and "he scraped the side of the car or something". Clark slowed and looked back but did not stop, "there didn't seem to be no damage" (R. 26b-27b). Bonnie Patterson said "we kinda jerked you know—I just thought it was where the road was torn up or something" (R. 61b). David Oursler recalled something which felt like a big bump in the street and learned later that Clark had hit a parked car. Three witnesses to the hit and run accident testified about the collision, the noise it created and the damage to the parked car of $149.00 (R. 88b-91b).

The Clark car proceeded after the hit and run collision to the intersection of Hale and 34th Street where it collided with the transit company bus, and, as a result of this collision, Terry Detenber and Richard Mattingly were killed and Patty Ross was injured. Clark testified at the trial that he stopped at the stop sign

making a complete stop (R. 51a), however, in a signed statement which Clark gave five days after the accident he said he didn't remember what happened and couldn't even place the intersection but knew there was a stop sign at Hale Street and he made a complete stop (R. 55a). Passenger Oursler in a statement given shortly after the collision stated "I am sure Michael did not make the boulevard stop at 34th Street" (R. 82a-83a). Bonnie Patterson in a statement given shortly after the accident stated "when we arrived at the intersection of 34th and Hale, Mike did slow down but did not make an attempt to stop (R. 63b). At the trial she could not remember whether the car came to a complete stop (R. 61b). Thus the two living occupants of the Clark car with any knowledge about the accident repudiated Clark's testimony about observing the boulevard stop. The only impartial eye-witness to the fatal collision who was forty feet from the intersection when the Clark car passed him driving at fifty miles per hour was Van McCray, who testified that Clark "run that boulevard stop there" (R. 92b). This witness was not permitted to testify at the trial because of a ruling by the trial Judge involving an agreement between counsel relative to supplying each other with the names of witnesses pre-trial. However, this testimony, until it was finally ruled out was a continuous spectre in the seven-day trial that necessarily influenced the thinking and judgment of insurance company's counsel in asserting the defense of assumed risk. A veteran police Officer, Sgt. Maupin, who in-

vestigated the accident testified catagorically that the driver Clark was intoxicated (R. 44b-52b).

After the fatal collision, Clark employed as his personal attorney, Hon. Frank E. Haddad, Jr., President of the Louisville Bar Association and a member of the Bar of the Supreme Court of the United States to represent him in criminal actions instituted against him, and to represent him in the civil actions for wrongful death and personal injury. The criminal case was disposed of before the civil actions were brought on for trial. Clark on the advice of his personal counsel, entered a plea of guilty to the offense of negligent homicide and upon his plea of guilty the facts of the case were presented to the Court without a jury and Clark was found guilty of negligent homicide and placed on probation for a period of three years (R. 57a-59a). The transit company introduced the judgment and the plea of guilty in evidence as was permitted by Kentucky law. Insurance Company counsel and Clark's personal counsel discussed with Clark the import of the introduction in evidence of the judgment and plea of guilty and counseled with Clark about his right to explain his plea (R. 63a). Young Clark suggested that he testify in explanation of his plea of guilty "that he didn't know what happened in his criminal case" (R. 120b). Mr. Haddad, Clark's counsel, as an honorable man, rejected this explanation because it was not true (R. 120b). Personal counsel and Insurance Company counsel concluded after the discussion with Clark and before the judgment of conviction was introduced, that

Clark's purported explanation was not honest or right and they rejected this explanation (R. 120b-124b).

The answer filed by the bus company in the state court consisted of a plea that the collision was brought about solely by the negligence of Clark and in addition thereto the transit company pleaded that the passengers should be barred from recovery on the ground that they assumed the risk of the injuries they sustained by knowingly riding with Clark, while intoxicated, and in continuing to remain in the car after the reckless hit and run incident. In addition, the bus company sought to recover from Clark on a cross-claim for the substantial damage to its bus. Clark's answer constituted a general denial and an allegation that the bus company's negligence was the sole cause of the collision. However, eight months before the trial of the action, Clark's insurance company counsel advised Mr. Haddad, personal counsel for Clark, that insurance company counsel believed that Clark had a good defense on the theory of contributory negligence (R. 111b-113b). On the morning of the first day of the trial, an amended answer was filed by insurance company counsel specifically pleading the defense of assumed risk or contributory negligence and a copy of this pleading was delivered to Clark's personal counsel as well as all other counsel in the case. Mr Haddad testified in his deposition in the District Court, that he knew the defense was available and that based upon the transcript of evidence in the Police court any attorney would have to say that the defense was available (R. 114b).

Clark's insurance company, long before the actual trial of the state court action, and continuously up to and throughout the trial of the action offered to pay the total limits of its insurance policy on behalf of Clark to secure a release from any further liability on Clark's part (R. 17b). The state Trial Court directed a verdict for the plaintiffs, against the two defendants, the bus company and Clark, unless the jury accepted the bus company's theory, and Clark's theory, of assumed risk on the part of the plaintiff passengers. The Court authorized the jury to apportion any award in one amount against the bus company and another against Clark, subject again to the prerogative on the part of the jury to find the plaintiffs guilty of contributory negligence. The state court jury returned verdicts totaling $59,000.00 in the wrongful death actions and apportioned the awards 90% against defendant Clark and 10% against the bus company. The bus company paid the judgments awarded against it and Clark's insurance company, American Universal, Respondent here, paid its total policy limits on the judgments.

In 1963, Petitioners instituted this action in the District Court alleging that they were assignees of American Universal's insured, Michael Clark, and sought to recover the difference between the total judgments awarded in the state court and the amount paid under the insurance policy by American Universal and by the bus company. The complaints in the District Court charged that insurance company counsel acted adversely to the insured, Clark, by injecting in the state court

trial the issue of assumed risk on the part of the passengers, and further alleged that insurance company counsel was guilty of negligence and bad faith in its conduct of the trial and defense of the Petitioners' claims. The actions of the two Petitioners in the District Court were consolidated (R. 32a) and the Insurance Company in the District Court filed its motion for Summary Judgment supported by an affidavit of counsel, which incorporated the entire Transcript of Record in the civil action in the state court and the entire Transcript of Evidence in the state court trial, consisting of 938 pages. The plaintiffs in the District Court, Petitioners here, likewise filed a motion for Summary Judgment supported by the affidavit of counsel and of the insured, Michael Clark. The District Court conducted a hearing on the Motions for Summary Judgment of the respective parties and determined that further evidence in the form of the deposition of Clark's personal attorney, Hon. Frank E. Haddad, Jr., be taken and made a part of the record. In the subsequent arguments before the District Judge and in the extensive brief filed by the plaintiffs, Petitioners here, counsel vigorously insisted that *as a matter of law* the insurance company's motion for Summary Judgment should be overruled and "that a Summary Judgment should, on the contrary, be awarded these plaintiffs". The District Court concluded, as each party had contended, that there was no issue of fact and that the action might appropriately be disposed of by Summary Judgment. (Appendix B, Petitioners Petition for Writ of Certiorari.) The Dis-

trict Court determined that American Universal had been willing and ready to pay its entire policy limits, and further determined that the conduct of the defense of the state court action by insurance company counsel was done in a reasonably skillful, professional manner, and that insurance company counsel exercised good faith in protecting the rights of its insured, and that under Kentucky law, a finding of bad faith or negligence in the conduct of the state court action by insurance company counsel was not justified. The Court thereupon dismissed the complaints.

Petitioners prosecuted an appeal to the United States Court of Appeals for the Sixth Circuit. The relief demanded on that appeal by Petitioners was that the judgment of the District Court be reversed and the case remanded to the District Court with direction to set aside the District Court's judgment in favor of American Universal Insurance Company "and in lieu thereof to direct the Court to enter a judgment in favor of the Plaintiff-Appellants, Detenber and Townsend, Petitioners here, in the amount prayed for in the complaint with interest and costs.

In Petitioner's brief on appeal to the 6th Circuit Court of Appeals, no contention whatever was made that Summary Judgment was improper. The United States Court of Appeals for the Sixth Circuit rendered its opinion February 9, 1967, affirming the judgment of the District Court (Appendix A, Petition for Writ of Certiorari). For the first time in a Petition for Rehearing in the Court of Appeals, Petitioners urged that

there was a genuine issue of material fact and that the District Court should not have granted Summary Judgment. The United States Court of Appeals for the Sixth Circuit overruled the Petition for Rehearing.

ARGUMENT.

1. **Petitioners Should Not be Permitted to Raise in This Court a Point Raised for the First Time on Petition for Rehearing in the Circuit Court of Appeals, That an Issue of Fact Was Presented in the District Court and Summary Judgment Was, Therefore, Improper, Particularly in View of the Fact That in the District Court and Upon Appeal to the Circuit Court of Appeals, Petitioners Took the Position That There Was no Issue of Fact and That Summary Judgment Was Proper and Petitioners Were Entitled to Judgment as a Matter of Law.**

As stated in the Counter Statement of Facts, both parties in the District Court made motions for summary judgment and Petitioners, who were plaintiffs in the District Court, urged the Court in oral argument and by written brief that there was no material question of fact and that Petitioners were entitled to summary judgment. Likewise, in the Circuit Court of Appeals Petitioners made no contention that summary judgment was improperly granted because there was material issue of fact and the relief prayed in the Court of Appeals was that the judgment of the District Court be reversed and the case remanded to the District Court with directions to set aside the judgments in favor of American Universal Insurance Company

and *in lieu thereof to direct the Court to enter a judgment in favor of the Petitioners.*

It has been repeatedly determined that courts of appeal will adhere to the theory of the case pursued in the trial court and will not, as a rule, consider objections resting on a different theory from that upon which the complaining party tried his case below. *Helvering* v. *Wood,* 309 U. S. 344, 84 L. Ed. 796, 60 S. Ct. 551; *McCullough* v. *Cammerer Corporation,* 323 U. S. 327, 89 L. Ed. 273. Contentions not made by plaintiff in the trial court and grounds of recovery not there suggested or urged, are not ordinarily considered. *Thomas* v. *Taylor,* 224 U. S. 73, 56 L. Ed. 673, 32 S. Ct. 403. While it is true that the appellate court is not bound by the trial court's rulings on questions of law, nevertheless, litigants should not be permitted to urge a position in the trial and appellate court, and when an adverse judgment is rendered, then attempt to take a totally different position.

We do not here contend that a summary judgment should be granted merely because both sides move for it. We recognize that an indispensable prerequisite for such a judgment is the absence of a material question of fact. *Hycon Mfg. Co.* v. *H. Koch & Sons* (CA 9), 219 F. 2d 353. The situation where both parties move for a summary judgment does not parallel that where both parties move for a directed verdict; in the latter, each party is held to agree that there is no disputed question of fact and that the case is to be decided upon the law; by contrast, in the former situation, by definition, judgment cannot be granted if there

is a disputed question of fact. *Brawner* v. *Pearl Ass. Co.*, (CA 9), 267 F. 2d 45. *Hughes* v. *Deckard* (CA 5), 267 F. 2d 697, is a typical personal injury action where the District Court granted summary judgment and the Appellate court reversed and remanded because it found that at the very least conflicting inferences were open. In that case, however, the losing party in the trial court did not move for summary judgment and indeed resisted it and appealed to the Circuit Court from the action of the District Court granting summary judgment. In *Chambers & Co.* v. *Equitable Life Ass. Society of the U. S.*, 224 F. 2d 338, both parties moved for summary judgment supported by affidavits and documents and the Court of Appeals upheld and affirmed a summary judgment in favor of the insurance company but commented that the fact that both parties filed and argued motions for summary judgment did not warrant the granting of either motion if the record reflected a genuine issue of fact.

In the case at bar, Petitioners below, moved for summary judgment and undertook to discharge the burden of demonstrating that there was no genuine issue of fact. Petitioners vigorously urged upon the District Court and the Circuit Court of Appeals that there was no genuine issue and that they were entitled to a judgment as *a matter of law*. This Court should not consider an assignment of error which Petitioners failed to call to the attention of the trial court or the Circuit Court of Appeals until after its judgment affirming had been entered, where as such matters do not

concern the jurisdiction of the Court. *McComb* v. *Goldblatt Bros.* (CA 7), 166 F. 2d 386; *Reconstruction Finance Corp* v. *Sun Lumber Co.* (CA 4), 126 F. 2d 731; *Henry B. Walker, Jr.* v. *Felmont Oil Corp.* (CA 6), 262 F. 2d 163; *Bergerson* v. *Minsour* (CA 1) 152 F. 2d 27; *U. S.* v. *Newburg Mfg. Co.* (CA 1), 123 F. 2d 453. While we recognize that this Court has the power to consider a plain error not specified in the interest of justice, only in exceptional cases will the Court review a question not raised in the Court below. *Duignon* v. *U. S.*, 274 U. S. 195, 200, 71 L. Ed. 996, 1,000, 47 S. Ct. 566; *Husty* v. *U. S.*, 282 U. S. 694, 701, 702, 75 L. Ed. 629, 632, 633, 51 S. Ct. 240. There are no exceptional circumstances here. There is no error. The Court of Appeals for the Sixth Circuit recognized that the District Judge was writing with an "Erie pen". It recognized that Kentucky law on the particular issue is currently established and that the highest court of Kentucky has determined "mere errors of judgment are not sufficient to constitute bad faith" and that bad faith is not merely negligence, but implies conscientious doing of wrong and partakes of the nature of fraud.

2. The Opinion of the U. S. Court of Appeals for the Sixth Circuit Does No Violence to Rule 56c, Federal Rules of Civil Procedure and Is Not Contrary to the Decisions of This Court.

Petitioners contend that the decision of the Circuit Court of Appeals violates Rule 56c since, they urge, that the Court of Appeals disregarded inferences that could be drawn from the facts contained in the record before the District Court. They contend that the record reveals a material issue of fact because conflicting inferences existed from the admitted facts. For this reason, they insist that summary judgment should not have been granted. Reference is made by Petitioners to two decisions of this court. *U. S.* v. *Diebold, Inc.*, 369 U. S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 and *White Motor Co.* v. *U. S.*, 372 U. S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696. *Diebold* involved a civil anti-trust suit. This Court concluded that inferences contrary to those drawn by the trial court might be permissible *in that fact situation. White Motor Co.* v. *U. S., supra,* was also a civil anti-trust suit. Therein this Court observed that summary judgment may not be appropriate where motivation and intent play leading rolls.

Petitioners make reference to a 1965 decision of the Kentucky Court of Appeals, *Roehrig* v. *Merchant's and Businessman's Mutual Ins. Co.*, 391 S. W. 2d 369, 371. Counsel imply that this decision changes the law of Kentucky on the subject of "good faith" and they suggest that the *Roehrig* decision in some wise changes or modifies the Kentucky law as determined by the

District Court and by the Circuit Court of Appeals in its opinion.. Both the District Court and the Circuit Court of Appeals recognized that the Kentucky law dealing with the question of good faith on the part of an insurance company is fixed and determined by that Court's decisions in *American Surety Company* v. *J. F. Schneider* and *Harrod* v. *Meridian Mutual Insurance Co.,* 389 S. W. 2d 192. Even a cursory examination of the Kentueky decision in *Roehrig* v. *Merchant's and Businessman's Mutual Ins. Co., supra,* immediately reveals that the Court is and dealing with the definition of "good faith" as that term is used in a Kentucky statute relating to the question of when a civil action shall be deemed to commence.

The Kentucky statute under consideration in *Roehrig,* KRS 413.250 provides

> "An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of an action."

The Court of Appeals of Kentucky in construing this statute adopted a definition of good faith as it relates to the issuance of process on the filing of a complaint. The *Roehrig* decision in no wise modifies or changes the Kentucky court's determination and definition of "good faith" as it relates to the actions of an insurance company in dealing with its insured. The District Court and the Circuit Court of Appeals correctly determined that the law of Kentucky on the pointed issue in this litigation has been firmly established.

The District Court, after considering the entire voluminous record of the state court action and having considered the affidavits filed in support of the motions for summary judgment and the deposition of Michael Clark's personal counsel, concluded that there *was no material issue of fact presented* and determined, *as a matter of law,* based on the Kentucky decisions, *supra,* that a finding of bad faith or negligence on the part of an insurance company's counsel was not justified and that, on the contrary, the defense of the insured was conducted in a reasonably skillful and professional manner and that counsel for the insurance company exercised good faith in attempting to protect the rights of its insured, Michael Clark. The Circuit Court of Appeals independently reviewed the entire record before it and considered the findings of fact and conclusions of law made by the District Judge and affirmed his decision.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE.

I, John P. Sandidge, Counsel for American Universal Insurance Company, Respondent, in the matter styled "Pearl Detenber, Administratrix of the Estate of Terry Detenber, Deceased, and Viola B. Townsend, Administratrix of the Estate of Richard Mattingly, Deceased v. American Universal Insurance Company" do hereby certify that I served a true copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the Petitioner on Oct. 19, 1968, by delivering a copy thereof to Raymond C. Stephenson, 310 West Liberty Street, Louisville, Kentucky, 40202, Josephine P. Hughett, 314 Armory Place, Louisville, Kentucky, 40202, and Harry L. Hargadon, 1916 Kentucky Home Life Building, Louisville, Kentucky, 40202, and by depositing a copy of same in a United States mailbox, with first class air mail postage prepaid, addressed to Henry G. Fischer, 1735 De Sales Street, N. W., Washington, D. C., 20036, Counsel of record for the Petitioners.

(s) John P. Sandidge.

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IN THE

Supreme Court Of The United States

No. 483

PEARL DETENBER, Administratrix of
the estate of Terry Detenber, deceased
and
VIOLA B. TOWNSEND, Administratrix
of the estate of Richard Mattingly, deceased - Petitoners

vs.

AMERICAN UNIVERSAL INSURANCE CO. - Respondent

PETITION FOR REHEARING OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

No._____

PEARL DETENBER, Administratrix of the estate of Terry Detenber, deceased
and
VIOLA B. TOWNSEND, Administratrix of the estate of Richard Mattingly, deceased - - - - - - *Petitioners*

vs.

AMERICAN UNIVERSAL INSURANCE CO. - *Respondent*

PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Pearl Detenber, Administratrix of the Estate of Terry Detenber, deceased, and Viola B. Townsend, Administratrix of the estate of Richard Mattingly, deceased, respectfully pray for rehearing on this Court's order of December 4, 1967, denying their petition for Writ of Certiorari, to review a final

decision of the United States Court of Appeals for the Sixth Circuit rendered on February 9, 1967, a petition for rehearing having been denied on April 12, 1967.

THE QUESTIONS PRESENTED

1. Has there been an intervening circumstance of substantial or controlling effect since the order denying the petition for a writ of certiorari on December 4, 1967?

2. Are there other substantial grounds available to petitioner although not previously presented?

RULES INVOLVED

The rule involved in this petition for rehearing of denial of writ of certiorari is Rule 58 of the Supreme Court Rules, which is printed in Appendix A infra at Pages 7-8.

REASONS FOR GRANTING THE REHEARING

Rule 58 of the Rules of the Supreme Court provide for petitions for rehearing and confine the grounds to:

> (1) . . . Intervening circumstances of substantial or controlling effect . . .

In the footnote to the rules the cases of Sanitary Refrig. Co. v. Winters, 280 U.S. 30, 34 footnote 1, and Massey v. U. S., 291 U.S. 608 are given as examples.

> (2) . . . or to other substantial grounds avail-

able to the petitioner although not previously presented.

The footnote to the rules refer to the case of Shriber Schroth Co v. Cleveland Trust Co., 305 U.S. 47, 50.

I. We respectfully submit that there has been an intervening circumstance of substantial and controlling effect since the order of this Court entered on December 4, 1967 in that the Kentucky Court of Appeals gave a final decision by overruling the Petition for Rehearing and issuing its Mandate affirming the verdict of the jury in the case of State Farm Mutual Auto Ins., Co. v. Marcum, et al., Ky., 420 S.W.2d 113, on November 24, 1967, and the case appeared in print in the South Western Reporter System for the first time in the December 12, 1967 issue. The order of this Court was entered on December 4, 1967.

The opinion of the Sixth Circuit was rendered on February 9, 1967, and is in clear unequivocal conflict with the law of Kentucky as determined by the intervening case of State Farm Mutual Auto Ins. Co. v. Marcum, et al., Ky., 420 S.W.2d 113. The law of Kentucky is that (1) an insurer, as a professional defender of lawsuits is held to a standard of care higher than that of an unskilled practitioner, (2) the insurer is liable for actionable bad faith or negligence in handling the insured's case, (3) a jury verdict for the insured will be upheld where there is evidence that the insurer conducted the handling of the claim against the insured according to the insurer's interest and not the insured, resulting in an excess verdict.

Such conduct is held in State Farm Mutual Auto Ins. Co. v. Marcum, et al. (supra), to be substantial evidence of bad faith. The District Court and the Court of Appeals hold contrariwise in the case at bar.

II. We respectfully submit that ground 2 under Rule 58 is likewise available to the petitioners in that we in our petition did not present to the Court the right of the Petitioners to a trial by jury guaranteed by the Seventh Amendment to the Constitution.

We join in the dissenting opinion of Mr. Justice Black and for want of ability to express it better, and with all proper respect, adopt his language that the action of the District Court and the Court of Appeals was:

> "... in flagrant disregard of the right of trial by jury guaranteed by the Seventh Amendment to the Constitution."

The Kentucky Court of Appeals in the above quoted case of State Farm Mutual Auto Ins. Co. v. Marcum, et al., reasons the same as Mr. Justice Black. It interprets Harrod v. Meridian Mutual Ins. Co., Ky., 389 S.W.2d 74, in the same manner as Mr. Justice Black and under this Marcum case the Kentucky Court of Appeals would undoubtedly also say:

> "... I cannot see how this evidence of bad faith on the part of the Insurance Company lawyer can be considered insufficient to make a case for the jury."

On a reading of the Kentucky Court of Appeals

decision in "Marcum", we submit the Kentucky Court would now also say:

> "This record establishes for me a rather convincing case of bad faith; at the very least I think a jury of 12 ordinary men with a common sense understanding of such matters, could reasonably conclude that the insurance company's conduct in this case amounted to conscious wrongdoing. By ordering summary judgment for the defendant, the Courts below simply imposed their own motions as to the most plausible inference to be drawn from this record, thereby denying the plaintiffs their constitutionally protected right to have their case decided by 12 ordinary citizens."

We respectfully submit that the opinion of the District Court and the Court of Appeals is in conflict not only with the law of Kentucky as declared in the following cases:

State Farm Mutual Auto Ins. Co. v. Marcum, et al., Ky., 420 S.W.2d 113

American Surety Co. of N. Y. v. J. F. Schneider & Son, Inc.,Ky., 307 S.W.2d 192

Fidelity & Casualty Co. of N. Y. v. Stewart Dry Goods Co., 208 Ky. 429, 271 S.W. 444, 43 ALR 318

Georgia Casualty Co. v. Mann, 242 Ky. 447, 46 S.W.2d 777

Harrod v. Meridian Mutual Ins. Co., Ky., 389 S.W.2d 74.

It is also in conflict with United States Fidelity &

Guaranty Co. v. Canale, (C.A. 6) 257 F.2d 138, as well as Brown v. United States Fidelity and Guaranty Co., (C.A. 2) 314 F.2d 675, and other Circuits and State Appeals Courts in cases heretofore cited in Petitioners' Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated, the Petition for Rehearing should be sustained and the Petition for Writ of Certiorari should be granted.

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APPENDIX A

RULE 58 OF THE UNITED STATES SUPREME COURT

Rehearings

1. A petition for rehearing of judgments or decisions other than those denying or granting certiorari, may be filed with the Clerk in term time or in vacation, within twenty-five days after judgment or decision, unless the time is shortened or enlarged by the court or a justice thereof. Such petition must briefly and distinctly state its grounds; it must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay; it must be printed in conformity with Rule 39; and forty copies, one of which shall bear the manuscript signature of counsel to the certificate, must be filed, accompanied by proof of service as prescribed by Rule 33. A petition for rehearing is not subject to oral argument, and will not be granted, except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court.

2. A petition for rehearing of orders on petitions for writs of certiorari may be filed with the clerk in term time or vacation, subject to the requirements respecting time, printing, number of copies furnished, manuscript signature of certificate, and service, as provided in paragraph 1 of this rule. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g., Sanitary Refrigerator Co. v. Winters, 280 U.S. 30, 34 footnote 1, 50 S.Ct. 9, 10; Massey v. United States, 291 U.S.

608, 54 S.Ct. 532), or to other substantial grounds available to petitioner although not previously presented (e.g., Schriber-Schroth Co. v. Cleveland Trust Co., 305 U.S. 47, 50, 59 S.Ct. 8, 9). Such petition is not subject to oral arguments. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified.

3. No reply to a petition for rehearing will be received unless requested by the court. No petition for rehearing will be granted in the absence of such a request and an opportunity to submit a reply in response thereto.

4. Consecutive petitions for rehearings, and petitions for rehearing that are out of time under this rule, will not be received.

APPENDIX B

AMENDMENT VII UNITED STATES CONSTITUTION

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

SUPREME COURT, U. S.

FEB 27 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 483

PEARL DETENBER, Administratrix of the Estate of TERRY DETENBER, Deceased and VIOLA B. TOWNSEND, Administratrix of the Estate of RICHARD MATTINGLY, Deceased, - - - - - - - - Petitioners,

versus

AMERICAN UNIVERSAL INSURANCE COMPANY, - - - - - - - - Respondent.

RESPONSE TO PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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v.

AMERICAN UNIVERSAL INSURANCE COMPANY, - - - - - - *Respondent.*

RESPONSE TO PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Response to Petitioners' Petition for Rehearing on denial of Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit is submitted pursuant to order of this court dated January 29, 1968.

Petitioners urge two reasons for granting their Petition for Rehearing. Their Petition for Writ of Certiorari was heretofore denied by this court December

4, 1967, with Mr. Justice Black dissenting. Petitioners contend first that the decision of the Kentucky Court of Appeals in the case of *State Farm Mutual Auto Insurance Company* v. *Marcum,* (decided March 31, 1967), 320 S. W. 2d 113, changes the Kentucky law followed by the Sixth Circuit Court of Appeals and that this decision is an intervening circumstance of substantial and controlling effect requiring the granting of the Writ of Certiorari. Secondly, petitioners contend, *for the first time,* that their right to trial by jury under the Seventh Amendment of the Constitution was denied. We shall respond to these contentions in the reverse order in which they are presented.

THE QUESTIONS PRESENTED.

1. Was the petitioners' right to trial by jury denied or infringed upon by the entry of summary judgment against them where petitioners vigorously insisted in the District Court and the Court of Appeals that no material issue of fact existed and petitioners themselves were entitled to summary judgment?
2. Does the decision of the Kentucky Court of Appeals in State Farm Mutual Insurance Company v. Marcum, *supra,* change the law of Kentucky relied upon by the District Court and the Circuit Court of Appeals and constitute an intervening circumstance of substantial or controlling effect since the order of this court denying the Writ of Certiorari?

Respondent respectfully submits that both these questions are properly answered in the negative and that the Writ of Certiorari was properly denied by this court December 4, 1967.

REASONS FOR DENYING THE PETITION FOR REHEARING.

1. Petitioners Were Not Denied the Right to Trial By Jury in Violation of the Seventh Amendment of the Constitution By the Entry of a Summary Judgment Against Them By the District Court.

Petitioners concede that they never contended heretofore in the District Court or in the Circuit Court of Appeals that the granting of summary judgment by the District Court infringed upon or denied them their right to trial by jury. Petitioners urge this position for the first time in their Petition for Rehearing of Writ of Certiorari and understandably and obviously their position is based upon the dissenting opinion of Mr. Justice Black.

While we recognize that this court has the power to consider a plain error not specified below in the interest of justice, only in exceptional cases will this court review a question not raised in the courts below. *Duignon* v. *United States,* 274 U. S. 195, 200, 71 L. Ed. 996, 1000, 47 S. Ct. 566; *Husty* v. *U. S.,* 282 U. S. 694, 701, 702, 75 L. Ed. 629, 632, 633, 51 S. Ct. 240.

Contentions not made in the trial court, and grounds of recovery not there suggested or urged, are not ordinarily considered. *Thomas* v. *Taylor,* 224 U. S. 73, 56 L. Ed. 673, 32 S. Ct. 403. It has been repeatedly

determined that Courts of Appeal will adhere to the theory of the case pursued in the trial court and will not, as a rule, consider objections resting on a different theory from that upon which the complaining party tried his case below. *Helvering* v. *Wood,* 309 U. S. 344, 84 L. Ed. 796, 60 S. Ct. 551; *McCullough* v. *Cammerer Corporation,* 323 U. S. 327, 89 L. Ed. 273.

In the District Court petitioners filed their Motion for Summary Judgment supported by affidavit. Petitioners undertook to discharge the burden of demonstrating that there was no genuine issue of fact and vigorously urged upon the District Court in oral argument and by written brief, that they were entitled to judgment as a matter of law. Respondent in the District Court likewise sought summary judgment and supported its motion by an affidavit filing the entire transcript of evidence in the state court proceedings that gave rise to this litigation.

The District Court did not proceed hastily, but considered, in addition to the pleadings, the affidavits filed and the transcript of evidence in the state court proceedings, the deposition of Michael Clark's personal counsel which the District Court required to be taken and filed as additional testimony prior to rendering summary judgment. It was, therefore, only after the most careful consideration of the extensive record and after giving all parties every opportunity to bring before the court any desired evidence that the District Court finally rendered summary judgment in favor of the respondent.

Following this, petitioners on their appeal to the Circuit Court of Appeals vigorously urged upon that court in their brief, and in their oral argument, that there was no genuine issue of fact and that the litigation should properly be disposed of by summary judgment. In the prayer for relief in the Circuit Court of Appeals, petitioners contended

> "that the judgment below should be reversed and the case remanded to the District Court with directions to set aside the Judgments in favor of the defendant-appellee, American Universal Insurance Company, and in lieu thereof to direct the court to enter a judgment in favor of the plaintiff-appellant."

While it is true that the appellate courts are not bound by the trial court's rulings on questions of law, nevertheless, litigants should not be permitted to urge a position in the trial and appellate courts and when adverse judgment is rendered, then attempt to assert a totally different position.

We do not understand that Mr. Justice Black in his dissenting opinion takes the position that the summary judgment procedure prescribed by Rule 56(c) of the Federal Rules of Civil Procedure deprives the party of constitutional right to trial by jury. This court in commenting on the question of right to trial by jury in relationship to the summary judgment procedure before the adoption of the Federal Rules of Civil Procedure in *Fidelity and Deposit Company of Maryland* v. *United States,* 187 U. S. 315, 320, 47 L. Ed. 194, 198, 23 S. Ct. 120 (1902), observed:

> "if it were true that the rule deprived plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right to trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses and to defeat attempts to use formal pleadings as means to delay the recovery of just demands."

Since the adoption of the Federal Rules, the constitutionality of Rule 56 has always been sustained. *Lindsey* v. *Levy* (CCA 9th, 1945) 149 F. 2d 899, cert. den. 326 U. S. 783, 90 L. Ed. 474, 66 S. Ct. 331 (1946). The court in Lindsey v. Levy, *supra,* stated:

> "If the only question involved in the litigation is one of law and there is no dispute as to material issues of fact, there is no room for a contention by the losing party that the granting of a motion for summary judgment deprives it of a jury trial."

We interpret Mr. Justice Black's dissenting opinion to express the view that under the facts recited in his dissent, he finds sufficient evidence of bad faith on the part of the Insurance Company to require the court to submit the issue to the jury.

Professor Moore in his text concerning summary judgment based on affidavits, makes the statement:

> "*Stubborn reliance* upon allegations and denials in the pleadings will not alone suffice, when faced with affidavits or other materials showing the absence of trial issues of material fact." Vol. 6 Moore's Federal Practice, 2d Ed. § 56.11, p. 2170.

Petitioners in their appellate briefs, both in the Circuit Court of Appeals and before this court, have *stubbornly relied upon* incorrect statements of fact not supported by the record. Petitioners have repeatedly urged in their briefs that the Respondent's insured, Michael Clark, proceeded to trial in the state court with the understanding that his defense would be the lack of negligence on his part, and they have *stubbornly asserted* in their briefs that Michael Clark for the first time on the day of the trial of the state court action became apprised of the fact that Insurance Company's counsel would urge as a defense the assumed risk of Clark's passengers, who were plaintiffs in the state court action.

The *record* establishes beyond per adventure of a doubt that more than *eight months prior to the trial* of the state court action, Insurance Company counsel advised Clark's *private counsel,* Hon. Frank E. Haddad, Jr., in writing:

> "At the same time it is our belief there is a good defense of contributory negligence available to Mr. Clark on the suits on behalf of his passengers" (R. 113b).

Mr. Haddad, an experienced attorney, and member of the bar of this court, testified in his deposition in the District Court relative to the decision of Insurance Company counsel to assert the defense of assumed risk:

> "I would say, based on the police court transcript, that any attorney would have to say that the defense was available" (App. 114b).

A copy of the amended pleading filed on the first day of the state court trial *asserting the defense of assumed risk was delivered to Clark's personal counsel,* Mr. Haddad, who was present on that occasion at the trial and in the chambers of the court during the preliminary pretrial proceedings at which counsel for the Insurance Company advised the court and all counsel present that it was Insurance Company counsel's opinion that the *sole defense* available to the Clark boy was the defense of assumed risk (R. 2b). The Circuit Court of Appeals recognized in its opinion, and the record is uncontradicted, that not only initially, was this position expressed, *but repeatedly* throughout the seven-day trial of the case in the state court, counsel for the Insurance Company was insisting that the best defense available to Clark was the defense of assumed risk.

The defense of assumed risk asserted by Insurance Company counsel, called to the attention of Clark's *personal counsel* eight months before trial and throughout the trial, was no novel or unusual scheme dreamed up by Insurance Company counsel to benefit the interest of Insurance Company and to surprise Clark. The defense of assumed risk of the passengers had been asserted *from the outset* by the bus company in its pleadings and was vigorously and relentlessly pursued during the seven-day trial by Transit Company's counsel, who introduced the evidence that formed the basis for this defense.

Another position, *stubbornly* advanced by Petitioners' Counsel, in their appellate briefs, contrary to

the record in the case, but which, the Circuit Court of Appeals, and Mr. Justice Black both apparently accepted as being true, was the contention that Insurance Company counsel permitted evidence that Clark had entered a plea of guilty in a related criminal action without objection, and in addition violated an agreement with Clark's personal counsel that Clark would have an opportunity to explain his plea of guilty to negligent homicide. *These contentions are not supported by the record.*

The law of Kentucky is firmly established that a plea of guilty, in a related criminal action, is admissible in the subsequent civil action. *Race* v. *Chappel*, 202 S. W. 2d 626; *Watson* v. *K&I Bridge and R.R. Co.*, 126 S. W. 146, 129 S. W. 341. The Transit Company introduced the judgment of the Criminal Court which recited that Clark had entered a plea of guilty. Under Kentucky law, no objection to this evidence would have merit. It is true that, under Kentucky law, a defendant who pleads guilty has the right to testify in the subsequent civil proceedings as to the circumstances under which the plea was made, and he is permitted to explain his reasons for such a plea. *Race* v. *Chappel, supra.* Insurance Company counsel and Clark's personal counsel were *fully familiar with his right to explain his plea* and they were fully aware that an explanation would be helpful to Clark before the civil jury. The testimony of Insured's *personal* counsel, Hon. Frank E. Haddad, Jr., in his deposition in the District Court is crystal clear that Mr. Haddad and Insurance Company counsel discussed the import of

the introduction in evidence by the bus company of Clark's plea. This discussion was had during the trial of the case (R. 118b-120b). Haddad and Insurance Company counsel agreed that the matter of the guilty plea should not be brought up, if possible, and they then discussed with young Clark what explanation he could give of his plea of guilty in the event other parties introduced the plea in evidence. Young Clark proposed to his lawyers that he testify in explanation of his plea that he really didn't know what had happened in the Criminal Court, and that his attorney, Haddad, took care of the whole matter (R. 120b). Haddad, as an honorable man, *completely rejected this explanation* as untrue, because he had carefully advised Clark at every point in the criminal proceedings. Haddad and Insurance Company counsel were unwilling to be parties to an explanation by Clark which would be false testimony.

Throughout the trial of the State Court action, Insurance Company counsel was confronted with the most difficult decision as to what defense could be urged on behalf of the insured, Clark, that would be *viable* and calculated to serve Clark's best interest. Throughout the pre-trial negotiations, and constantly throughout the trial, Insurance Company counsel had offered its full policy limits in settlement of Clark's full responsibility. This finding was made by the District Judge in his decision granting summary judgment (R. 117a). Petitioners in the state court action *were not interested in Clark's $20,000.00.* They were interested *only* in obtaining additional recovery against the bus

company since they knew they could have Clark's $20,000.00 any time they wanted. They, therefore, vigorously asserted throughout the trial the theory of the joint and concurring negligence of the bus company driver. In this respect, the pre-trial discovery, the written statements of various witnesses obtained by the parties, the proceedings at the coroner's inquest and in the criminal action against Clark, further accentuated by the unanimous testimony of objective police officers that Clark was intoxicated, and the testimony of his passengers and the only impartial eye witness that Clark ran the boulevard stop made the possibility of convincing the jury that the *sole cause* of the collision was the bus driver's negligence a completely unrealistic possibility. To have asserted this defense, to the exclusion of all others, undoubtedly would have resulted in a large excess verdict against Clark.

An obvious alternative defense that might be asserted in view of the insurmountable evidence on the question of sole cause was the defense that the collision was the result of the joint and concurring negligence of Clark and the bus driver. Possibly, this might result in the jury placing some of the onus on the defendant bus company. This defense likewise presented Insurance Company counsel with considerable problems.

To assert the defense of joint and concurring negligence to the exclusion of any other defense might well result in exactly what did happen. Even though the jury concluded that there was joint and concurring

negligence, the jury would be permitted, as it was properly permitted under Kentucky law, to apportion the damages between the defendants. If the jury returned a verdict of $82,500.00 in the *Detenber* case and $80,000.00 in the *Townsend* case, and $62,000.00 in the companion personal injury *Ross* case *as it was authorized to do under the trial court's instructions,* any foreseeable apportionment of the verdict was virtually certain to result in an excess verdict against the insured, Clark. If the jury returned awards totaling $70,000.00 in all three cases, *as they in fact did,* and if the jury apportioned these awards on a 50/50 basis between Clark and the bus company, the result would be an excess verdict against Clark of more than $25,000.00. If, on the other hand, the jury concluded, as it did conclude, on the basis of the very evidence which convinced Insurance Company counsel that a successful defense on the basis of sole cause could not be maintained that Clark was 90% at fault, and the bus company 10% at fault, then a $70,000.00 verdict so apportioned would be an excess judgment of a most substantial amount and the inevitable result.

The third alternative available to Insurance Company counsel was the obvious defense of assumed risk on the part of Clark's passengers which would defeat any recovery against Clark if the jury accepted the substantial, probative, evidence available concerning drinking by Clark and his companions, and the reckless operation of the automobile in a previous hit and run accident and at the scene of the fatal accident.

The District Judge did not rely upon Petitioner's counsel's statement as to the fact situation presented in the state court. The District Judge had before him every line of the evidence transcribed in the state court proceedings and the deposition of Clark's *personal counsel* in the District Court. The District Court was, thus, aware that long prior to the trial, and continuously throughout the trial, Insurance Company counsel was attempting to pay Petitioners, the entire policy limits of Clark's policy. The District Court was aware from the uncontradicted evidence that Insurance Company counsel had advised Clark's private counsel long before trial, and on the morning of trial, that the defense of assumed risk would be asserted. The District Court was aware of the uncontradicted evidence that the Bus Company's counsel, pleaded and introduced reliable evidence that Clark's passengers *knowingly* rode with him while he and they were drinking, and while he was driving in a reckless manner. The District Court knew that Clark's personal counsel and Insurance Company counsel discussed with Clark his explanation of his plea of guilty in the related criminal case. The District Court knew from the uncontradicted evidence that neither, personal counsel nor Insurance Company counsel *would be a party to permitting Clark to testify falsely* as to why he pleaded guilty.

It was upon the basis of the undisputed evidence that the District Court determined, and the Circuit Court of Appeals concluded, that there was no issue of fact presented to the District Court and that the ac-

tion was one which might be appropriately disposed of by summary judgment as both parties were insisting. On the basis of the evidence, the District Court concluded that the Insurance Company was ready prior to the trial of this action and at the trial to pay its full policy limits, and that the conduct of the trial of the state court action by Insurance Company counsel was performed in a reasonably skillful, professional manner and revealed that the defendant Insurance Company exercised good faith in protecting the rights of its insured, Michael Clark.

2. The Decision of the Kentucky Court of Appeals in *State Farm Mutual Insurance Company* v. *Marcum* in Nowise Changes the Law of Kentucky Which Was Relied Upon By the District Court and the Circuit Court of Appeals and For This Reason Does Not Constitute an Intervening Circumstance of Substantial and Controlling Effect Within the Meaning of Rule 58 of the Rules of This Court.

The judgment of the District Court reveals on its face that in reaching a determination the District Judge was fully aware of the latest decisions of the Kentucky Court relating to the question of bad faith of an insurance company. *Georgia Casualty Company* v. *Mann,* 242 Ky. 447, 46 S. W. 2d 777; and *American Surety Company of New York* v. *J. F. Schneider & Sons,* 307 S. W. 2d 192. While an appeal was pending in this case in the Court of Appeals, the Kentucky Court decided *Harrod* v. *Meridian Mutual Insurance Company,* Ky., 389 S. W. 2d 74, 76 (1964). This de-

cision was brought to the attention of the Court of Appeals since it reaffirmed Kentucky's interpretation of "good faith" in the Georgia Casualty and American Surety Company cases. In *Harrod* v. *Meridian Mutual Insurance Company,* the Kentucky court "explained and specifically adopted" certain language contained in the Massachusetts case of *Spiegel* v. *Beacon Participations, Inc.,* 297 Mass. 398, 416, 8 N. E. 2d 895, 907. The Kentucky Court concluded that it had aligned itself with the majority of jurisdictions by adopting a definition of bad faith which required "conscious doing of wrong," or "a breach of a known duty through some motive of interest or ill will," or "anything that partakes of the nature of fraud." Based upon the definition adopted by Kentucky in *Harrod* v. *Meridian Mutual,* the highest appellate court of Kentucky affirmed the action of the trial court in granting the insurance company's motion for summary judgment.

Petitioners contend that in some fashion the Kentucky Court's decision in State Farm Mutual Insurance Company against Marcum *supra,* changes the law of Kentucky. Presumably petitioners are urging that because the Kentucky Court in this case found summary judgment improper and reversed the state trial court with instructions to submit the case to the jury, Kentucky law is changed. On the contrary, the Kentucky Court in the State Farm Mutual decision specifically referred to its previous decision in *Harrod* v. *Meridian Mutual* and specifically reaffirmed the def-

inition of "bad faith" contained in the Meridian opinion.

It is true that the Kentucky Court in State Farm Mutual holds that it was proper to submit the case to the jury, but it is vitally important to recognize that in the opinion of the Kentucky Court written by Mr. Justice Steinfeld, that the facts set forth in State Farm Mutual v. Marcum were "the unusual circumstances existing in this case".

The State Farm Mutual case, like the *Meridian Mutual* case and Georgia Casualty and American Surety Company cases, involved the failure of the Insurance Company to settle substantial claims within the limits of the policy where liability of the insured appeared reasonably certain. In Meridian Mutual, the Kentucky Court of Appeals concluded that under the circumstances of that case, the conduct of the Insurance Company in failing to settle did not, *as a matter of law,* constitute bad faith and, therefore, the granting of summary judgment by the trial court was justified and affirmed. On the other hand, the Kentucky Court of Appeals, considering the unusual circumstances set forth in State Farm Mutual against Marcum, concluded that the case should have been submitted to the jury under proper instructions.

The decision in State Farm Mutual does not change the law in Kentucky. It does not determine that all questions of Insurance Company's bad faith should be submitted to a jury. The decision in *Meridian Mutual* is equally the law of Kentucky as certainly as is the decision in State Farm Mutual. Kentucky remains

aligned with those jurisdictions who determine that "bad faith" must be exhibited by some competent evidence of conscious doing of wrong or partaking of the nature of fraud.

We respectfully submit, therefore, that petitioners should not be permitted to raise for the first time in the Supreme Court of the United States the question of the validity of summary judgment where they tried their case in the District Court and the Circuit Court of Appeals on the theory that they, indeed, were entitled to summary judgment, and we further respectfully submit that the Kentucky Court's decision in *State Farm Mutual Insurance Company* v. *Marcum* does not in anywise change or alter the law of Kentucky and that the District Court and the Circuit Court of Appeals, writing with an "Erie pen", correctly interpreted the Kentucky law.

We, therefore, respectfully and earnestly urge that the Petition for Rehearing of Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

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Counsel for Respondent.

CERTIFICATE OF SERVICE.

I, John P. Sandidge, Counsel for American Universal Insurance Company, Respondent, in the matter styled "Pearl Detenber, Administratrix of the Estate of Terry Detenber, Deceased, and Viola B. Townsend, Administratrix of the Estate of Richard Mattingly, Deceased v. American Universal Insurance Company" do hereby certify that I served a true copy of the foregoing Response to Petition for Rehearing on Denial of Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on the Petitioners on February 26, 1968, by delivering a copy thereof to Raymond C. Stephenson, 310 West Liberty Street, Louisville, Kentucky, 40202, Josephine P. Hughett, 314 Armory Place, Louisville, Kentucky, 40202, and Harry L. Hargadon, 1916 Kentucky Home Life Building, Louisville, Kentucky, 40202, and by depositing a copy of same in the United States mailbox, with first class air mail postage prepaid, addressed to Henry G. Fischer, 1735 De Sales Street, N. W., Washington, D. C., 20036, Counsel of record for the Petitioners.

John P. Sandidge.